PP v. GENNEVA MALAYSIA SDN BHD & ORS AND ANOTHER APPEAL

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD SHAHRIR MOHD SALLEH JC
[CRIMINAL APPEALS NO: 42LB-38-03-2017
& 42LB-39-03-2017]
25 NOVEMBER 2020

CRIMINAL LAW: *Anti-Money Laundering and Anti-Terrorism Financing Act 2001, s. 4(1) – Money laundering – Company involved in scheme of sale and buy-back of gold – Money trail showed remittances linked to companies where accused persons were directors and companies having related businesses – Whether element of mens rea for offence of money laundering established – Whether offence of money laundering established*

BANKING: *Banking and Financial Institutions Act 1989 – Section 25 – Offences – Receiving deposits without valid license – Company involved in scheme of sale and buy-back of gold – Allegation that business model adopted by company amounted to deposit-taking – Whether company accepted deposit without valid licence – Whether monies received, acquired and/or transferred monies were proceeds of unlawful activity*

CRIMINAL LAW: *Banking offences – Company receiving deposits without valid licence – Banking and Financial Institutions Act 1989, s. 25(1) – Company involved in scheme of sale and buy-back of gold – Allegation that business model adopted by company amounted to deposit-taking – Whether company accepted deposit without valid licence – Whether monies received, acquired and/or transferred monies were proceeds of unlawful activity*

The first respondent, Genneva Malaysia Sdn Bhd ('Genneva'), was involved in the sale of gold to purchasers, at a premium between 20% to 25% of the normal retail price. Under its scheme, (i) a monthly gift termed as '*hibah*' was payable for a certain period of time to those who purchased gold from Genneva; and (ii) at the end of the tenure for *hibah*, it was orally agreed between Genneva and the purchasers that Genneva would buy-back the gold from the purchasers at its original price. For the purpose of sale transactions, Genneva maintained two current accounts. Investigations revealed that (i) the scheme involved the sale and buy-back of gold; (ii) all monies received by Genneva in the sale of gold were remitted into the first and second accounts; (iii) these monies were then transferred into other accounts through the issuance of multiple cash cheques which were drawn from a number of accounts and later taken in cash or treated in contra with other accounts; (iv) the money trail showed that a number of remittances were made into the bank accounts of certain companies and the directors for these companies were the respondents/accused persons. Remittances were also made to certain other companies having businesses related to Genneva. The

respondents were charged at the Sessions Court for: (i) without a valid licence, (a) accepting deposit under s. 25(1) of the Banking and Financial Institutions Act 1989 ('BAFIA'); (b) being a director of the company who accepted deposit under s. 25(1), read together with s. 106(1) of the BAFIA; and (c) abetting the commission of the offence of accepting deposit under s. 25(1) read together with s. 112(1)(c) of the BAFIA; and (ii) money laundering under s. 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA'). At the end of the defence case, the trial judge acquitted and discharged all the accused persons of the charges related to the offence of accepting deposit without a valid licence and money laundering, respectively. Hence, the present appeal by the prosecution.

In support of its appeal, the prosecution submitted that (i) the trial judge erred in fact and in law in acquitting and discharging all the accused at the close of defence for charges relating to accepting deposit without a licence and money laundering; (ii) although the terms of the sales and purchase agreement, the letter of *hibah* and the certificate of ownership of gold did not contain the buy-back option, the directors and advisor for Genneva admitted that Genneva did practice the buy-back from its purchasers; (iii) the buy-back option was explained orally to the customers by the consultants engaged by Genneva; (iv) the purchasers of gold testified that they were given the option to re-sell the gold back to Genneva and Genneva had, in fact, re-purchased the gold from them at the original sale price; (v) the re-purchase of gold by Genneva would not yield any profit for Genneva as when it was first sold, the sale price would have included the amount of profit if it actually was an ordinary sale and purchase transaction. As such, it did not make any business sense to re-purchase gold at its original price unless Genneva was actually using gold as a means to carry out its deposit-taking activities; (vi) the price of gold purchased from Genneva was between 20% to 25% higher than the price offered by normal jewellers. There was every likelihood for the purchasers to re-sell the gold back to Genneva instead of keeping it as an investment or reselling it to any other person and this effectively made the defence's argument that it was an ordinary sale and purchase of gold as a mere gimmick; (vii) when the enforcement officers of the Central Bank of Malaysia raided the premises of Genneva and seized its properties, the value of gold stock and the total amount of money held by Genneva were far below the value of gold purchased but yet to be delivered to the purchasers; (viii) in the meetings held between Genneva and the officers of the Central Bank of Malaysia, the true nature of its operations was not fully disclosed; (ix) the fact that there was allegedly no loss occasioned to the customers as considered by the trial judge was not a relevant consideration insofar as the charges of accepting deposit without a valid licence were concerned; (x) the unlawful activity was the activity of accepting deposit without a valid licence which was an offence under s. 25(1) of the BAFIA; (xi) the accused persons

had received, acquired and/or transferred monies which were proceeds of an unlawful activity; (xii) it may be inferred from the objective factual circumstances that the accused knew or had reason to believe that the money was the proceeds of an unlawful activity.

In response, the respondents argued that: (i) the charges under s. 25(1) of the BAFIA for accepting deposit without a valid licence were vague and defective for want of particulars. The prosecution failed to specify in the charges what was the 'deposit' within the meaning ascribed to it under s. 25(3) of the BAFIA, from whom the deposit was received, how many depositors from which the deposit were received and the amount of the deposit received; (ii) Genneva was not required under the law to obtain a licence under s. 6(4) of the BAFIA because it was not carrying on any banking, finance company, merchant banking or discount house business; (iii) the licensing requirement under s. 25(1) of the BAFIA only related to the carrying on of any banking, finance company, merchant banking or discount house business but Genneva was not carrying on those businesses. As such, there was no necessity for Genneva to be so licensed; (iv) the business model adopted by Genneva did not amount to deposit-taking because: (a) it was only carrying on the business of trading in gold and there was no evidence to show any person ever deposited any money with Genneva; (b) when gold is sold to the purchasers, there were no terms as to the repayment or return of the purchase price and the sale of gold is a typical sale of goods transaction, (c) each sale was completed when the purchaser received the gold physically together with the certificate of ownership, (d) the buy-back practised by Genneva was merely a goodwill and not a legal obligation as evidenced by the various documents and the purchasers were not obliged to re-sell the gold back to Genneva; (e) the re-sale of gold back to Genneva were fresh and separate transactions involving separate exchange of consideration between the parties and were not deposit-taking; (v) assuming that the charges under s. 4(1) of the AMLATFA were based on the offence under s. 25(1) of the BAFIA, the prosecution failed to prove that the offence under s. 25(1) of the BAFIA had been proven; (vi) assuming that the prosecution had proved the offence under s. 25(1) of the BAFIA, the prosecution had still not proved the required element of *mens rea* for the offence of money laundering under s. 4(1) of the AMLATFA (vii) there was no evidence to show that Genneva or the other accused persons knew or had reason to believe that the money in question was the proceeds of an unlawful activity as Genneva had taken all reasonable steps to ensure that the money was not from the proceeds of unlawful activity; and (viii) receipt of the money in the accounts of the other accused persons have been explained to be: (a) salaries and bonuses; (b) claims for expenses incurred; (c) commissions on sales; (d) management consultant fees; (e) payment for consultation services; and (f) *hibah* payments received on behalf of customers.

Held (allowing appeal):

(1) This was clearly not an ordinary sale transaction. Gold was sold and re-purchased at the same price. There was no element of profit in that scenario. In the absence of the profit element, one could only think of a charitable scenario but Genneva was not a charitable organisation and far from being a welfare body. The absence of the profit element in the transaction and the presence of '*hibah*' had in fact revealed something more sinister. The fact that the 'buy-back' was explained by the consultants of Genneva to the customers was not disputed. If a 'buy-back' was not part of the terms, there was no necessity for the consultants to explain it to the customers. The 'buy-back' practice coupled with the express term of 'no buy-back guarantee' terms were essentially the underlying terms of the scheme perpetuated in disguise by Genneva. (paras 54 & 55)

(2) No matter how the documents were worded, they could not absolve Genneva and all the accused from the fact that the true nature of the gold transaction was indeed an illegal deposit-taking scheme. The *modus operandi* and business model adopted by Genneva was inconsistent with its stand that it was only carrying out an ordinary trade in gold. Furthermore, if it was an ordinary trade in gold, there was no necessity for the terms on *hibah*. The terms on *hibah* and the express terms of no buy-back guarantee were mere guises and camouflages in an attempt to conceal the real deal, namely, that Genneva was involved in deposit taking without a valid licence. (paras 60, 65 & 66)

(3) The sixth respondent was equally culpable. Section 106(1) of the BAFIA is a deeming provision of the commission of the offence by a director where the offence is committed by the company. The effect of this deeming provision is equivalent to any other statutory presumptions in other laws. Merely asserting that he had no role to play in the illicit scheme was not enough. The position as a director carries certain duties and responsibilities under the law. Section 106(1) of the BAFIA requires the accused as a director to do something more, befitting his position, duties and responsibilities. There was nothing to show that the sixth respondent, as a director, had done anything to ensure that Genneva did not embark on a venture that was against the law. Under the law, as a director he could not shun away from his duties or liabilities by claiming that the matter was not within his purview. The sixth respondent had not successfully brought himself within the statutory defence provided for under s. 106(1) of the BAFIA. (paras 70-72)

(4) The whole background for the sale of gold to the customers and the buy-back practice by Genneva was actually the term of the transaction which had been carefully crafted to elude detection by the authorities. The business model adopted by Genneva amounted to nothing more than a

scheming gimmick to perpetuate its activities and that has attracted an offence under s. 25(1) of the BAFIA. Genneva was merely using gold as a medium to camouflage the deposit-taking scheme it perpetuated. Since gold was a very attractive and valuable commodity, it lends a bit more credit to the unsuspecting public compared with any other scam of deposit-taking. But when the scheme was closely examined, it clearly defied common sense and on the same breath did not constitute a defence that was probable in the circumstances of the case. (paras 68 & 73)

(5) The term 'proceeds of an unlawful activity' simply means any property which is obtained as a result of any unlawful activity. 'Unlawful activity' in turn is defined as any activity which is related to any serious offence. The 'serious offence' in the present appeal is the offence under s. 25(1) of the BAFIA, namely of accepting deposit without a valid licence. In respect of the charges under s. 4(1)(a) of the AMLATFA for the offence of money laundering, the prosecution had adduced sufficient evidence to prove the receipt of monies by each accused through multiple cash cheques which originated and was traceable from the two bank accounts belonging to Genneva. The prosecution had also adduced sufficient evidence by means of a forensic accounting analysis and the money trail to show that the monies in these accounts were proceeds of an unlawful activity, namely of the offence under s. 25(1) of the BAFIA of accepting deposit without a valid licence which is categorised as a serious offence under the AMLATFA. (paras 76, 78 & 79)

(6) Evidence showed that all the accused persons had knowledge of the business model of Genneva. They knew: (i) Genneva was not legally licensed to accept deposits; (ii) Genneva sold gold at a premium of between 20% to 25% compared with the normal retail price for gold; (iii) Genneva practised buy-back of gold from its purchasers at the original price; (iv) Genneva makes '*hibah*' payments to its purchasers; and (v) despite the price of gold sold by Genneva was higher than the normal retail price for gold, a sizeable number of customers still opted to purchase gold from Genneva whereas the purchasers (a) could simply purchase the same gold from any normal jewellers at a cheaper price if indeed they intend to keep the gold as an investment; (b) need not wait for the price of gold to exceed more than the premium they paid in order to get profit for their investment; and (c) the purchasers could easily lose a lot more if the price of gold drops as they had purchased at a premium from Genneva. All the accused persons must be taken to at least harbour some reasonable suspicion as to the business model practised by Genneva and must undertake steps to make further inquiries rather than just rely on what was advised to them by persons appointed by Genneva itself. Even a casual visit to the nearest jeweller could immediately put them on alert as to the normalcy of the transaction. (paras 81 & 83)

(7) The defence failed to raise a reasonable doubt in the prosecution's case and that the prosecution succeeded in establishing its case against the respective accused persons beyond a reasonable doubt in respect of the charges for the offences of, without a valid licence, (i) accepting deposit under s. 25(1) of BAFIA; (ii) accepting deposit without a valid licence under s. 25(1) read together with s. 106(1) of the BAFIA; (iii) the commission of the offence of accepting deposit under s. 25(1) read together with s. 112(1)(c) of the BAFIA; and (iv) in respect of the offence of money laundering under s. 4(1)(a) of the AMLATFA. The decision of the trial judge was reversed and the following accused persons were convicted as per the following: and convict the following accused persons as follows: (i) Genneva for the offence of accepting deposit under s. 25(1) of the BAFIA; (ii) the second, third and fifth respondents and one Ahmad Khairuddin, respectively, as the officers of Genneva for the offence of accepting deposit without a valid licence under s. 25(1) read together with s. 106(1) of the BAFIA; (iii) the fourth respondent for abetting the commission of the offence of accepting deposit without a valid licence under s. 25(1) read together with s. 112(1)(c) of the BAFIA; and (iv) Genneva, the second to sixth respondents and the tenth to thirteenth respondent, respectively, for the offence of money laundering under s. 4(1)(a) of the AMLATFA. The respondents were sentenced accordingly. (paras 85, 86 & 92)

Case(s) referred to:

Amir Hassan Ali Usin v. PP [2019] 3 CLJ 325 CA ***(refd)***
Azmi Osman v. PP & Another Appeal [2015] 9 CLJ 845 CA ***(refd)***
Beucar Accessories (M) Sdn Bhd v. Gordon Toh Chun Toh & Ors [2012] 1 LNS 164 HC ***(refd)***
Gunalan Ramachandran & Ors v. PP [2006] 1 CLJ 857 FC ***(refd)***
Lim Kheak Teong v. PP [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207 FC ***(refd)***
Low Kai Gie v. PP [2019] 1 LNS 1807 CA ***(refd)***
Muhammad Kin Eezaz Abdullah v. PP [2014] 6 CLJ 175 CA ***(refd)***
Periasamy Sinnappan v. PP [1996] 3 CLJ 187 CA ***(refd)***
PP v. Gan Boon Aun [2015] 9 CLJ 328 CA ***(refd)***
PP v. Loo Choon Fatt [1976] 1 LNS 102 HC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
Tan Sri Abdul Rahim Mohd Noor v. PP [2001] 4 CLJ 9 CA ***(refd)***

Legislation referred to:

Anti-Money Laundering and Anti-Terrorism Financing Act 2001, ss. 3, 4(1)(a)
Banking and Financial Institutions Act 1989 (repealed), ss. 2, 6(4), 25(1), (3), 103(1)(a), 106(1), 112(1)(c), Fourth Schedule
Criminal Procedure Code, ss. 170, 316

(Criminal Appeal No: 42LB-38-03-2017)
For the appellant - Tengku Amir Zaki Tengku Abdul Rahman, Harris Ong Mohd Jeffery Ong, Alvin Ong Heng Kiat & Hardeep Kaur; DPPs
For the 1st, 2nd, 3rd, 5th, 6th, 10th, 11th & 13th respondents - Gooi Soon Seng, Kulaselvi Sandrasegaram & Choong Kak Sen; M/s Gooi & Azura
For the 4th & 12th respondents - Gobinath Mohanna & Jaya Prem; M/s The Law Office of Mohanna & Co

(Criminal Appeal No: 42LB-39-03-2017)
For the appellant - Tengku Amir Zaki Tengku Abdul Rahman, Harris Ong Mohd Jeffery Ong, Alvin Ong Heng Kiat, Hardeep Kaur; DPPs
For the 1st, 2nd, 3rd & 5th respondents - Gooi Soon Seng, Kulaselvi Sandrasegaram & Choong Kak Sen; M/s Gooi & Azura
For the 4th respondent - Gobinath Mohanna & Jaya Prem; M/s The Law Office of Mohanna & Co
For the 6th respondent - Nasbal Harun & Mohd Irzan Iswatt Mohd Noor; M/s Haniff Khatri

[Editor's note: Appeal from Sessions Court; Arrest Case No: 62-(808-809)-09-2013.]

Reported by Najib Tamby

JUDGMENT

Ahmad Shahrir Mohd Salleh JC:

Introduction

[1] The parties are referred to as they were at the trial court. The charges proffered against the accused persons relate to the offence of accepting deposit without a valid licence under the Banking and Financial Institutions Act 1989 ("BAFIA") ("Appeal No. 39") and the offence of money laundering under the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLATFA") ("Appeal No. 38").

[2] As both the offences of accepting deposit without a valid licence and money laundering were related to one another and committed in the same transaction, the learned trial judge ordered both offences to be tried together under s. 170 of the Criminal Procedure Code.

[3] At the Sessions Court, there were:

Offence of accepting deposit

(i) a total of two charges proffered against Genneva Malaysia for the offence of accepting deposit without a valid licence under s. 25(1) of the Banking and Financial Institutions Act 1989 ("BAFIA"),

A Being a director of the company who accepted deposit

(ii) a total of eight charges proffered against four accused persons as directors of a company for the offence of accepting deposit without a valid licence under s. 25(1) read together with s. 106(1) of the BAFIA,

B Abetting the acceptance of deposit

(iii) a total of two charges proffered against an accused for abetting the commission of the offence of accepting deposit without a valid licence under s. 25(1) read together with s. 112(1)(c) of the BAFIA,

C Money laundering

(iv) a total of 1,394 charges proffered against 14 accused persons for the offence of money laundering under s. 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLATFA").

D **[4]** At the end of the prosecution's case:

(i) six out of the seven accused persons were ordered to enter their defence on charges related to the offence of accepting deposit without a valid licence, and

E (ii) 13 out of the 25 accused persons were ordered to enter their defence on the charge of money laundering.

All other accused persons were acquitted and discharged of the charges relating to the offence of accepting deposit without a valid licence and money laundering, respectively.

F **[5]** At the end of the defence case, the learned trial judge acquitted and discharged all the accused persons of the charges related to the offence of accepting deposit without a valid licence and money laundering, respectively. The prosecution was not satisfied with the decision of the learned trial judge and appeals against the acquittal.

G **[6]** On the date fixed for case management, the prosecution withdrew its Appeal No. 38 for the money laundering charges against the Ng Wan Yee (seventh accused), Ng Yee Yaw (eighth accused) and Ng Wan Yean (ninth accused) and this court accordingly struck out the appeal on 22 July 2019. Ng Poh Weng, the fourth accused in both Appeals No. 38 and 39, did not contest and conceded the appeal. This was based on a concession made between the prosecution and the respective accused as the seventh, eighth and ninth accused persons are the children of the fourth accused.

H

I

The Charges

[7] For ease of reference and brevity purposes, the respective charges proffered against the accused will be reproduced in general. The respective charges read as follows:

> Offence of accepting deposit without a valid licence
>
> Bahawa (**nama tertuduh**) di antara (**tarikh kesalahan dikatakan telah dilakukan**) di (**tempat kesalahan dikatakan telah dilakukan**) telah menerima deposit daripada orang awam melalui suatu akaun semasa bernombor (nombor akaun) di (nama bank) tanpa suatu lesen yang sah yang diberikan di bawah subseksyen 6(4) Akta Bank dan Institusi-Institusi Kewangan 1989 melalui satu skim yang melibatkan transaksi emas dan bahawa kamu pada masa berlakunya kesalahan penerimaan deposit tanpa lesen sah tersebut adalah pengarah syarikat tersebut dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 25(1) Akta Bank dan Institusi-Institusi Kewangan 1989 dan boleh dihukum di bawah seksyen 103(1)(a) Akta yang sama dibaca bersama Nombor Siri 20 dalam Jadual Keempat Akta yang sama.
>
> Being a director of the company who accepted deposit without a valid licence
>
> Bahawa (**nama tertuduh**) di antara (**tarikh kesalahan dikatakan telah dilakukan**) di (**tempat kesalahan dikatakan telah dilakukan**) telah menerima deposit daripada orang awam melalui suatu akaun semasa bernombor (**nombor akaun**) di (nama bank) tanpa suatu lesen yang sah yang diberikan di bawah subseksyen 6(4) Akta Bank dan Institusi-Institusi Kewangan 1989 melalui satu skim yang melibatkan transaksi emas dan bahawa kamu pada masa berlakunya kesalahan penerimaan deposit tanpa lesen sah tersebut adalah pengarah syarikat tersebut dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah seksyen 25(1) Akta Bank dan Institusi-Institusi Kewangan 1989 dibaca bersama seksyen 106(1) Akta yang sama dan boleh dihukum di bawah seksyen 103(1)(a) Akta yang sama dibaca bersama Nombor Siri 20 dalam Jadual Keempat Akta yang sama.
>
> Money laundering
>
> Bahawa kamu, pada (**tarikh kesalahan dikatakan telah dilakukan**) di (**tempat kesalahan dikatakan telah dilakukan**), telah melibatkan diri dalam pengubahan wang haram iaitu dengan memindahkan wang sebanyak (**amaun yang dikatakan terlibat**) yang merupakan hasil daripada aktiviti haram melalui cek bernombor (**nombor cek**) daripada akaun (**nama bank**) bernombor (nombor akaun bank) ke dalam akaun (**nama bank**) bernombor (nombor akaun) dan oleh itu kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 4(1)(a) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001. (emphasis added)

The Case For The Prosecution

The Offence Of Accepting Deposit Without A Valid Licence

[8] Genneva Malaysia Sdn Bhd ("Genneva Malaysia") was involved in the sale of gold to purchasers under its scheme. Under the scheme, a monthly gift termed as "*hibah*" was payable to those who purchased gold from Genneva Malaysia. Pursuant to the scheme, the "*hibah*" was payable for a certain period of time and at the end of the tenure for the "*hibah*", it was orally agreed between Genneva Malaysia and the purchasers that Genneva Malaysia will buy-back the gold from the purchasers at its original price. Genneva Malaysia sold gold at a premium of between 20% to 25% of the normal retail price.

[9] For the purposes of transactions relating to the sale of gold, Genneva Malaysia maintained two current accounts at the CIMB Islamic Bank Berhad of the Kuchai Lama branch as follows:

(i) CIMB Islamic Bank Berhad Account No. 1456-0000510-10-0 ("first account"), and

(ii) CIMB Islamic Bank Berhad Account No. 1456-0000662-10-4 ("second account").

[10] According to the purchasers who were called by the prosecution as witnesses, the terms of the purchase from and resale of gold to Genneva Malaysia were as follows:

(i) Genneva Malaysia provided gold for purchase,

(ii) each purchase of gold from Genneva Malaysia was promised a monthly "*hibah*" for variable periods of between two to four months,

(iii) a week before expiry of the tenure for the "*hibah*", the purchasers could elect to re-sell the gold back to Genneva Malaysia and Genneva Malaysia will buy-back the gold at its original purchase price,

(iv) all payments to Genneva Malaysia were made directly into the account of Genneva Malaysia at CIMB Islamic Bank Berhad, and

(v) all transactions were documented in a written agreement but the "*hibah*" was documented separately in a "letter of *hibah*". The "letter of *hibah*" contained the percentage of "*hibah*" payable and the tenure of the "*hibah*".

[11] PW8 to PW14 and PW43 testified that they were offered by Genneva Malaysia to buy gold with the promise that the gold which they purchased could be resold at its original price to Genneva Malaysia. In addition, Genneva Malaysia will give them as much as between 2% to 6% of "*hibah*" based on the value of gold purchased for a period of between three to six months. All witnesses also testified that the gold was re-purchased by Genneva Malaysia at its original price.

[12] Prior to the month of June 2011, the agreements between Genneva Malaysia and the participants contained the term whereby Genneva Malaysia will buy-back the gold at its original price. By a memo dated 15 March 2012, a "customer declaration form" was introduced by Genneva Malaysia. The "customer declaration form" contains an acknowledgement by the purchasers that Genneva Malaysia gave no guarantee that it will buy-back the gold. Despite the "customer declaration form", it was the practice of Genneva Malaysia to buy-back all gold sold to its purchasers at the original price.

[13] According to the *agent provocateur*, Azizul Adzani bin Abdul Ghafar (PW34) of the Central Bank of Malaysia who posed as one of the participants in the scheme, although he had read certain advertisements in the newspapers which states that Genneva Malaysia did not provide any "buy-back guarantee" for the gold, his experience in personally dealing with Genneva Malaysia proved otherwise.

[14] PW34 said that he made a purchase of gold from Genneva Malaysia on 30 April 2012. The agreement he signed with Genneva Malaysia did not contain the "buy-back" terms. A staff of Genneva Malaysia, Ummi Salmah (PW40) explained to PW34 that customers may still opt to re-sell the gold at its original price. PW50 also confirmed that a similar explanation was given to PW34. According to PW34, he was never shown the "customer declaration form" neither did he sign the same when he purchased gold from Genneva Malaysia.

[15] Despite not signing any "customer declaration form" during the purchase, PW34 said he was still able to make a purchase and later re-sold the gold back to Genneva Malaysia on 23 July 2012 at its original price of RM10,150. On 1 October 2012, the business premises of Genneva Malaysia was raided by the enforcement officers of the Central Bank of Malaysia on suspicion of accepting deposit without a valid licence.

[16] There was also evidence to show that the gold trade carried out by Genneva Malaysia was somewhat different than the ordinary. PW56, the director of Poh Kong, in his testimony said that Poh Kong will never repurchase back gold wafers or gold bullion at its original price because the selling price has a profit margin but they will lose if they buy-back the gold at its original price. PW56 further said that even if Genneva Malaysia sell gold at a premium, the element of profit from that sale will come to naught when the gold is re-purchased at its original price.

The Offence Of Money Laundering

[17] The investigating officer of the Department of Financial Intelligence and Enforcement of the Central Bank of Malaysia, Husein bin Zakaria (PW89), carried out an investigation against Genneva Malaysia and all of its directors and officers for the offence of accepting deposit without a valid

licence. The scheme involved the sale and buy-back of gold under s. 25(1) of the BAFIA as well as for the offence of money laundering under s. 4(1)(a) of the AMLATFA.

[18] Pursuant to his investigation, PW89 found that all monies received by Genneva Malaysia in the sale of gold were remitted into the first account and the second account between the month of February 2011 and 1 October 2012. These monies were then transferred into other accounts through the issuance of multiple cash cheques. The multiple cash cheques were drawn from a number of accounts and later taken in cash or treated in contra with other accounts.

[19] The money trails also showed that a number of remittances were made into the bank accounts of certain companies and the directors for these companies were the accused persons. Remittances were also made to certain other companies having businesses related to Genneva Malaysia. PW89 carried out a forensic accounting analysis of all the banking documents relating to the inflow and outflow of monies from the bank accounts of the accused persons and the companies related to Genneva Malaysia.

The Case For The Defence

Against The Charges For Accepting Deposit Without A Valid Licence

[20] In respect of the charges under s. 25(1) and the related charges under s. 106(1) and s. 112(1)(c) of the BAFIA, it was the crux of the defence case that Genneva Malaysia was running a lawful business in selling and buying of gold based on the *Syari'ah* principles. It was also the basis of the business of Genneva Malaysia that there was no licence required to trade in gold.

[21] On its own initiatives, Genneva Malaysia established a Syari'ah Advisory Committee Board (SACB) to advise it in all matters relating to *Syari'ah* compliance in the trade of gold. SACB consisted of persons who, according to Genneva Malaysia, are experts in the field. They are Dato' Dr Hailani Mujir Tahir Abdul Azil, Prof Dr Amrit bin Md Hashim, Prof Madya Dr Shamsiah Muhammad and Mr Mohd Fadhly Md Yusri and Prof Dr Ashraf. SACB advised and made recommendations to Genneva Malaysia in respect of *Syari'ah* compliance in the sale and purchase of gold. The advise and recommendations were given after SACB has studied the standard operation procedures, the policy and all documents as furnished by Genneva Malaysia.

[22] Genneva Malaysia also employed the services of a lawyer, Mr Hargopal Singh (DW12), for legal advisory services and to prepare all the necessary agreements and documents relating to the sale and purchase of gold. According to DW12, there was no requirement then, between April 2011 and October 2012, for Genneva Malaysia to be licensed or to get any approval to carry out the sale and purchase of gold. The requirement for

license and approval was only made mandatory when the Financial Services Act 2013 was introduced. Other than the legal advisory services provided by DW12, Genneva Malaysia also obtained the services of independent consultants. These independent consultants are required to undergo certain courses before they can be appointed as consultants for Genneva Malaysia.

[23] The consultants are not paid a salary but receive commissions on any concluded sales. The entitlement to the commission is subject to the consultant receiving a certificate of attendance showing that he had attended Genneva Malaysia's compliance workshop and that he is a member of the Gold Bullion Entrepreneurs Association of Malaysia (GBEAM).

[24] The price of gold sold by Genneva Malaysia was based on the price of gold as determined by GBEAM in accordance with the recommended daily retail price. On average, Genneva Malaysia bought its gold bullion far higher in quantity compared with the quantity bought by the existing purchasers in its scheme. When the price of gold drops, Genneva Malaysia will keep them as stocks. In that manner, the monthly moving average of gold price purchased by Genneva Malaysia would be much lower than the price of gold purchased by the purchasers even at its original price.

[25] The sale of gold became complete when the gold purchased and the certificate of ownership for the gold were delivered to the purchaser. At that time, the purchaser became the absolute owner of the gold. The purchaser was at liberty to do whatever he pleased with the gold, whether to keep it or re-sell it back to Genneva Malaysia or to any other third party.

[26] The sales and purchase agreement for the gold signed between the purchaser and Genneva Malaysia states that the "*hibah*" is a gift given voluntarily to the purchaser by Genneva Malaysia at its sole discretion. It was also within the absolute discretion of Genneva Malaysia to determine the rate of "*hibah*" payable and the tenure for which the "*hibah*" may be payable. At times, the "*hibah*" was also given in kind, for example in the form of a handphone.

[27] It was not the policy of Genneva Malaysia to offer any "buy-back" guarantee for the gold it sold. However, Genneva Malaysia admitted that in practise, in the year 2011 and 2012 it has been buying back gold at the original price. This was due to the fact that at the material time the price of gold was on an increasing trend and Genneva Malaysia was capable of paying the "*hibah*". As long as it was profitable for Genneva Malaysia to buy-back, it will continue to buy-back gold to gain customer loyalty with the confidence that the gold was genuine and worth the price they were paid for. On top of that, Genneva Malaysia believed that the price of gold will keep on increasing and it would be wise and prudent to buy-back the gold even at its original sale price.

[28] According to Genneva Malaysia, it had no reasons to doubt the legal advise by DW12 and the recommendations of SACB as the sale and purchase of gold were done in accordance with law and were *Syari'ah* compliant. Genneva Malaysia too had, on several occasions, held a series of discussions with the Central Bank of Malaysia for guidance and had explained its business model to them.

[29] Genneva Malaysia also said that it had informed the Central Bank of Malaysia that they were not giving any "buy-back guarantee" and in the event the purchasers wish to re-sell the gold back, it would be at the sole discretion of Genneva Malaysia whether or not to accept it. The Central Bank of Malaysia had even suggested to Genneva Malaysia to publish a public announcement in the local newspapers to the effect that Genneva Malaysia was not licensed under s. 6(4) of the BAFIA, that there was no "buy-back guarantee" and that all investors should conduct their own due diligence and bear their own risk in investments. This public announcement as approved by the Central Bank of Malaysia was published in seven mainstream local newspapers on 27 February 2012.

[30] The sixth accused on the other hand in his defence maintained that, although at the material time he was a director for Genneva Malaysia, he was not involved in the management and operations of the company. His presence and role in the company Malaysia was only to act as a Malay Muslim director because Genneva Malaysia was carrying on a business based on the *Syari'ah* principles. He was not even a signatory to the accounts and had no say in how Genneva Malaysia manages its finances.

Against The Charges For Money Laundering

[31] In respect of the charges for the offence of money laundering under s. 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLATFA"), it was the defence case that they have no reasonable suspicion to believe that the money is the proceeds of an unlawful activity and that they have taken reasonable steps to ascertain that the money is not the proceeds of an unlawful activity. This is based on the fact that Genneva Malaysia had carried out various seminars relating to compliance with the BAFIA and AMLATFA which was conducted by DW12 and attended by all the consultants.

[32] As an experienced practising lawyer, DW12 had represented to them that the business model of Genneva Malaysia was valid and did not contravene any laws and they had relied on that representation. It was also the defence case that the SACB established by Genneva Malaysia had also represented to them that the business model of Genneva Malaysia was *Syari'ah*-compliant.

[33] According to the defence, all transfers of money made by Genneva Malaysia to their respective accounts were made through the banking system and that they had never received any query from the banks for any suspicious transactions. All payments into their respective accounts were made by cheques and the remittances have been approved by the banks in open transactions. The defence also relied on fact that the sale and purchase of gold transactions were carried out in accordance with the customer declaration forms, the customer purchase orders and other documents used by Genneva Malaysia in the business.

Brief Deliberations Of The Appellant

[34] It is the contention of the prosecution that the learned trial judge had erred in fact and in law in acquitting and discharging all the accused at the close of defence for charges relating to accepting deposit without a licence and money laundering.

Accepting Deposit Without A Valid Licence

[35] In arguing that the defence against the charges of accepting deposit without a valid licence was not probable and not capable of raising a reasonable doubt in the prosecution's case, the submissions of the learned DPP may be summarised as follows:

(i) although the terms of the sales and purchase agreement, the letter of *hibah* and the certificate of ownership of gold do not contain the buy-back option, DW8, DW9 and DW10 who were the directors and advisor for Genneva Malaysia admitted that Genneva Malaysia did practice the buy-back from its purchasers,

(ii) the "buy-back" option was explained orally to the customers by the consultants engaged by Genneva Malaysia,

(iii) the testimony given by PW8, PW9, PW10, PW12 and PW34 who purchased gold from Genneva Malaysia all confirmed the fact that they were given the option to re-sell the gold back to Genneva Malaysia and that Genneva Malaysia had in fact, re-purchased the gold from them at the original sale price,

(iv) the re-purchase of gold by Genneva Malaysia would not yield any profit for Genneva Malaysia as when it was first sold, the sale price would have included the amount of profit if it actually was an ordinary sale and purchase transaction. As such, it does not make any business sense to re-purchase gold at its original price unless Genneva Malaysia was actually using gold as a means to carry out its deposit-taking activities,

(v) the price of gold purchased from Genneva Malaysia is between 20% to 25% higher than the price offered by normal jewellers. As such, there is every likelihood for the purchasers to re-sell the gold back to

Genneva Malaysia instead of keeping it as an investment or reselling it to any other person and this effectively made the defence's argument that it was an ordinary sale and purchase of gold as a mere gimmick,

(vi) when the enforcement officers of the Central Bank of Malaysia raided the premises of Genneva Malaysia and seized its properties, the value of gold stock and the total amount of money held by Genneva Malaysia were far below the value of gold purchased but yet to be delivered to the purchasers,

(vii) in the meetings held between Genneva Malaysia and the officers of the Central Bank of Malaysia, the true nature of its operations was not fully disclosed, and

(viii) the fact that there was allegedly no loss occasioned to the customers as considered by the learned trial judge was not a relevant consideration insofar as the charges of accepting deposit without a valid licence are concerned.

Money Laundering

[36] In arguing that the defence against the charges of money laundering was not probable and not capable of raising a reasonable doubt in the prosecution's case, the submissions of the learned DPP may be summarised as follows:

(i) the unlawful activity is the activity of accepting deposit without a valid licence which is an offence under s. 25(1) of the BAFIA,

(ii) the accused persons had received, acquired and/or transferred monies which were proceeds of an unlawful activity,

(iii) the investigating officer, Hussein bin Zakaria (PW89), in his testimony confirmed that all monies received by Genneva Malaysia out of the sale of gold between the month of February 2011 and 1 October 2012 were remitted into Genneva Malaysia's bank accounts as follows:

(a) CIMB Islamic Bank Berhad Account No. 14560000510100, and

(b) CIMB Islamic Bank Berhad Account No. 14560000662104,

(iv) the forensic accounting analysis carried out by PW89 showed the money-trail that the monies in Genneva Malaysia's bank accounts were transferred into various related accounts through multiple cash cheques transactions by way of contra-account transactions and some of them were encashed,

(v) it may be inferred from the objective factual circumstances that the accused knew or had reason to believe that the money is the proceeds of an unlawful activity, and

(vi) the defence was a bare denial.

Brief Contention Of The Respondents

Accepting Deposit Without A Valid Licence

[37] In response to the appeal for the charges of accepting deposit without a valid licence, the contention of learned counsel may be summarised as follows:

(i) the charges under s. 25(1) of the BAFIA for accepting deposit without a valid licence were vague and defective for want of particulars. The prosecution failed to specify in the charges what was the "deposit" within the meaning ascribed to it under s. 25(3) of the BAFIA, from whom the deposit was received, how many depositors from which the deposit were received and the amount of the deposit received,

(ii) Genneva Malaysia was not required under the law to obtain a licence under s. 6(4) of the BAFIA because it was not carrying on any banking, finance company, merchant banking or discount house business,

(iii) the licensing requirement under s. 25(1) of the BAFIA only relates to the carrying on of any banking, finance company, merchant banking or discount house business but Genneva Malaysia was not carrying on of those businesses. As such, there was no necessity for Genneva Malaysia to be so licensed,

(iv) the business model adopted by Genneva Malaysia did not amount to deposit-taking because:

(a) it was only carrying on the business of trading in gold and there was no evidence to show any person ever deposited any money with Genneva Malaysia,

(b) when gold is sold to the purchasers, there was no terms as to the repayment or return of the purchase price and the sale of gold is a typical sale of goods transaction,

(c) each sale was completed when the purchaser received the gold physically together with the certificate of ownership,

(d) the buy-back practised by Genneva Malaysia was merely a goodwill and not a legal obligation as evidenced by the various documents and the purchasers were not obliged to re-sell the gold back to Genneva Malaysia,

(e) in any event, the re-sale of gold back to Genneva Malaysia were fresh and separate transactions involving separate exchange of consideration between the parties and were not deposit-taking,

(v) the report prepared by KPMG on sustainability of the business model of Genneva Malaysia produced by the prosecution is not relevant to the charges under s. 25(1) of the BAFIA because sustainability of the business is not an element of the offence,

(vi) the KPMG report was prepared based on assumptions and as such it was grossly inaccurate,

(vii) an adverse inference should be drawn against the prosecution for its failure to call Jeremy Lee and Mazlan Ahmad, both of the Central Bank of Malaysia, as witnesses or to offer them to the defence as both of them were involved in meetings held between the Central Bank of Malaysia and Genneva Malaysia whereby certain actions by Genneva Malaysia was approved in the meeting.

[38] Learned counsel for the sixth accused, as a Director for Genneva Malaysia, contends that he has succeeded in bringing his defence within the ambit of s. 106(1) of the BAFIA. As such, he shall not be guilty of the offence committed by Genneva Malaysia. The submissions of learned counsel for the sixth accused may be summarised as follows:

(i) that the sixth accused had no say in the operation or management of Genneva Malaysia and had no authority in managing or controlling the finances of Genneva Malaysia,

(ii) that the sixth accused had never, at all material times, assist in the management and operation of Genneva Malaysia,

(iii) that the sixth accused's role was merely to fulfil the requirement for a Malay Muslim director because Genneva Malaysia was carrying on a business based on the *Syari'ah* principles,

(iv) that the sixth accused was not one of the account signatories for Genneva Malaysia.

Money Laundering

[39] In response to the appeal for the charges of money laundering, the contention of learned counsel may be summarised as follows:

(i) the charges were defective as they did not state what was the unlawful activity from which the proceeds in question were drawn,

(ii) even assuming that the charges under s. 4(1) of the AMLATFA were indeed based on the offence under s. 25(1) of the BAFIA, the prosecution has failed to prove that the offence under s. 25(1) of the BAFIA has been proven,

(iii) even assuming that the prosecution has proved the offence under s. 25(1) of the BAFIA, the prosecution has still not proved the required element of *mens rea* for the offence of money laundering under s. 4(1) of the AMLATFA,

(iv) there was no evidence to show that Genneva Malaysia or the other accused persons knew or had reason to believe that the money in question is the proceeds of an unlawful activity as Genneva Malaysia had taken all reasonable steps to ensure that the money is not from the proceeds of unlawful activity,

(v) receipt of the money in the accounts of the other accused persons have been explained to be:

(a) salary and bonus,

(b) claims for expenses incurred,

(c) commissions on sales,

(d) management consultant fees,

(e) payment for consultation services,

(f) *hibah* payments received on behalf of customers.

Analysis

Exercise Of Appellate Powers

[40] In hearing an appeal from a subordinate court, s. 316 of the Criminal Procedure Code empowers an appellate court:

(i) to dismiss the appeal if there is no sufficient ground to intervene in the findings of the trial court,

(ii) in an appeal against acquittal:

(a) to reverse or affirm the acquittal,

(b) to direct a further inquiry or order a retrial, or

(c) to find the appellant guilty and pass sentence on him according to law,

(iii) in an appeal against conviction or sentence:

(a) to reverse the finding and sentence and acquit or discharge the accused,

(b) to order a retrial,

(c) to alter the finding, maintain, reduce, enhance or alter the nature of the sentence either or with or without altering the finding,

(iv) in an appeal from any other order, alter or reverse such order.

(See also: *Muhammad Kin Eezaz Abdullah v. PP* [2014] 6 CLJ 175 CA; [2014] MLJU 1931; [2014] MLRAU 139).

[41] It is trite that in exercising its appellate powers, the High Court should properly consider and carefully weigh matters such as:

(i) the views of the trial judge on the credibility of witnesses;

(ii) the presumption of innocence in favour of the accused;

(iii) the right of the accused to the benefit of any doubt; and

(iv) the slowness of an appellate court in disturbing a finding of fact arrived at by a trial judge who had the advantage of seeing the witnesses.

(See: *Lim Kheak Teong v. PP* [1984] 2 CLJ 219; [1984] 1 CLJ (Rep) 207 FC; [1985] 1 MLJ 38; [1984] 1 MLRA 126, *Periasamy Sinnappan v. PP* [1996] 3 CLJ 187 CA; [1996] 2 MLJ 557; [1996] 1 MLRA 277; [1996] 2 AMR 2511).

[42] An appellate court is obviously fettered by the lack of audio-visual advantage of the trial court. As such, it should not make its own findings of facts unless there are substantial and compelling reasons for disagreeing with the findings made by the trial court. (See: *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 FC; [2005] 6 MLJ 393; [2005] 2 MLRA 590; [2005] 6 AMR 203, *Low Kai Gie v. PP* [2019] 1 LNS 1807 CA; [2020] 1 MLJ 476; [2019] MLRAU 382).

Misdirection By The Learned Trial Judge

[43] In reviewing the decision of the learned Sessions Court Judge at the close of prosecution, I am of the considered view that the findings of the learned trial judge at the close of prosecution was properly made on the strength of the evidence placed before him. I have no reasons to intervene in his findings of a *prima facie* case in respect of the charges under BAFIA and AMLATFA.

[44] During the defence case, the learned trial judge seems to have taken a reverse course and revisited his findings of *prima facie* case. At para. 139 of this written grounds, the learned trial judge said, *in verbatim*, as follows:

> [139] Apabila meneliti kembali keterangan pihak pendakwaan sememangnya tidak dapat dinafikan bahawa kesemua dokumen-dokumen yang dikemukakan tidak menzahirkan bahawa terdapat elemen-elemen yang menunjukkan adanya pengambilan deposit sebagaimana ditakrifkan di bawah BAFIA dan keadaan ini adalah selari dengan keterangan yang dibentangkan oleh pembelaan. Pada zahirnya dilihat sebagai bentuk perniagaan jual beli sebuah produk yang biasa.

and towards the later part of his written grounds, the learned trial judge concluded that there was no buy-back guarantee whereas when he made a finding of a *prima facie* case, the fact of a buy-back or repayment which is a constituent element of the expression "deposit" under s. 2 of BAFIA as modified by s. 25(3), must be taken to have already been successfully proved by the prosecution.

[45] As the charges for money laundering under s. 4(1)(a) of the AMLATFA were predicated upon the offence under s. 25(1) of the BAFIA of accepting deposit without a valid licence, the learned trial judge had acquitted and discharged all the accused persons for the money laundering charges as a consequence of his finding that the prosecution has failed to prove the predicate offence.

[46] In considering the defence case, the learned trial judge had directed his mind principally to the following:

(i) that the sale of gold was completed when gold was delivered to the customer in consideration of the purchase price;

(ii) that payment of the "*hibah*" is at the discretion of Genneva Malaysia and not as a matter of right vested in the customer;

(iii) that there was no document to evidence the buy-back term to support the charge of accepting deposit without a licence under s. 25(1) of BAFIA;

(iv) that the element of repayment which is constituent in the definition of deposit was in fact negated by a term which states that Genneva Malaysia gives no buy-back guarantee.

[47] The position of the law is trite. At the end of the defence case, it is the duty of the trial court to make a finding as to whether the defence has succeeded in raising a reasonable doubt in the prosecution's case and whether the prosecution has succeeded in establishing its case beyond a reasonable doubt when the defence is considered against the totality of the evidence adduced by the prosecution. In this regard, respectfully, I am of the considered view that the consideration of the defence by the learned trial judge suffers from misdirection which warrants intervention from this court.

The Offence Of Accepting Deposit Without A Valid Licence

[48] In a charge under s. 25(1) of the BAFIA for the offence of accepting deposit without a licence, it is incumbent on the prosecution to prove the acceptance of deposit by the accused and that the accused is not a person licensed under s. 6(4) of the Act. For this purpose, the meaning of the term "deposit" becomes crucial.

[49] For the purposes of s. 25 of the BAFIA, the definition of the term "deposit" under s. 2 is modified pursuant to s. 25(3). Taking into consideration the modification under sub-s. (3), the term "deposit" for the purposes of s. 25 of the BAFIA reads as follows:

Interpretation

2. (1) In this Act, unless the context otherwise requires:

"deposit" means a sum of money or any precious metal, or any precious stone, or any article which is comprised, in part or in whole, of any precious metal or precious stone, and any other article or thing as may be prescribed by the Minister, on the recommendation of the Bank, received, paid or delivered on terms:

(a) under which it will be repaid or returned, with or without interest or at a premium or discount; or

(b) under which it is repayable or returnable, either wholly or in part, with any consideration in money or money's worth,

and such repayment or return being either on demand or at a time or in circumstances agreed by or on behalf of the person making the payment or delivery and the person receiving it, regardless whether the transaction is described as a loan, an advance, an investment, a saving, a sale or a sale and repurchase, but does not include money paid *bona fide*:

(A) by way of an advance or a part payment under a contract for the sale, hire or other provision of property or services, and is repayable only in the event that the property or services is not or are not in fact sold, hired or otherwise provided;

(B) by way of security for the performance of a contract or by way of security in respect of any loss which may result from the non-performance of a contract;

(C) without prejudice to paragraph (B), by way of security for the delivery up or return of any property, whether in a particular state of repair or otherwise; and

(D) in such other circumstances, or to or by such other person, as specified in the First Schedule;

Common Features Of The Impugned Scheme

[50] According to testimonies of the purchasers or participants of the scheme who were called as witnesses by the prosecution, the common features of the impugned scheme of gold trade by Genneva Malaysia are as follows:

(i) all participants are required to sign an agreement including a "letter of *hibah*" prepared by Genneva Malaysia for the purchase of gold,

(ii) a certificate of ownership is given for every purchase of gold,

(iii) the "letter of *hibah*" states, among other things

(a) the tenure of the "*hibah*",

(b) the rate or percentage of "*hibah*" available to the participants if they re-sell the gold back to Genneva Malaysia within seven days before expiration of the tenure of "*hibah*",

(iv) Genneva Malaysia will always buy-back the gold at its original price.

[51] In this regard, the evidence of the following prosecution's witnesses is considered.

(i) Evidence of Lim Fang Tseng (PW8)

(vol. 2[b], pp. 395-396 of the appeal record)

Question: Mr. Lim, can you please tell the Court what was the business explained to you or offered by Genneva Malaysia Sdn Bhd?

Answer: Buy the gold; we will put in money to buy the gold. Then receive interest or sell the gold at more expensive price.

Question: Mr. Lim, you mentioned 3 things, you buy gold, receive interest or sell the gold at more expensive price. Let's talk about the interest. Can you tell the Court upon paying to Genneva Malaysia Sdn Bhd, how many times would you receive the interest?

Answer: We will receive it after 3 months, there is 3 months' contract.

Question: And do you know if any other the payment of interest, apart from the 3 months one time, is there any situation where it is more than once in 3 months, do you know?

Answer: I cannot remember.

Question: Mr. Lim, you mentioned duration of 3 months so what happens after the 3 months? What do you get?

Answer: We get the money; we have to return our gold.

Question: You return the gold, did you get any money?

Answer: Yes, we get back the money plus the interest.

(ii) Evidence of Datin Noorlinda binti Abd Talib (PW9)

(vol. 2[c], pp. 473-474 of the appeal record)

Saya pernah dengar mengenai syarikat Genneva Sdn Bhd. Saya diperkenalkan oleh seorang kawan ketika saya tengah mencari investment jangka pendek. Saya diperkenalkan oleh Dato' Philip oleh kawan iaitu Puan Abidatul. Saya diperkenalkan syarikat Genneva Sdn Bhd sekitar tahun 2009 oleh Dato' Philip mereka datang untuk ke rumah saya menerangkan investment berkenaan.

Soalan: Apakah penerangan diberikan mengenai investment?

Jawapan: Penerangan dia sangat mudah dan membuat saya tertarik, saya cuma tukarkan saya punya cash kepada gold dan gold itu, saya simpan. Maknanya, saya cuma tidak memegang cash, saya memegang ketulan emas yang mempunyai value yang sama. Dalam masa yang sama, saya diberi *hibah* on monthly basis.

Soalan: Apa yang Datin lakukan seterusnya?

Jawapan: Saya sungguh berminat sebab setelah saya kira investment yang ini bayar 24% setahun. Jadi pelaburan jangka pendek yang sungguh menguntungkan sebab saya tak rugi, saya memegang gold.

(vol. 2[c], pp. 516 – 517 of the appeal record)

Soalan: Yang perkara jual balik ini bahawa syarikat GMSB ini menawarkan jual balik kepada pembeli-pembeli ini diterangkan oleh siapa?

Jawapan: Consultant.

Soalan: Apakah yang diterangkan tentang jual balik ini semasa Datin mula-mula masuk untuk membeli emas di dalam syarikat Genneva Malaysia Sdn Bhd. Apakah yang diterangkan pasal jual balik ini?

Jawapan: Penjelasan dia saya tak ada banyak risiko sebab harga yang saya beli harga yang sama akan saya jual sekiranya saya nak jual. Jadi saya tak mengikut harga pasaran yang membuatkan saya lagi bertambah yakin. Risk diminimakan.

Soalan: Berdasarkan kepada keyakinan kerana tiada risiko yang tinggi, Datin pun membeli emas?

Jawapan: Ya.

Soalan: Apakah yang menyebabkan Datin terus berminat untuk membeli emas dengan syarikat Genneva?

Jawapan: Sebab dia tawarkan diskaun yang lumayan. 2% per month.

Soalan: Selain diskaun ada tak apa-apa sebab lain?

Jawapan: Tidak ada.

Soalan: Tadi Datin menyatakan, Datin setiap kali masuk akan jual balik. Bagaimana Datin tahu bahawa jual balik itu akan berlaku?

Jawapan: Sebab saya diberi contract untuk berapa lama tempoh contract saya dengan Genneva.

Soalan: Jadi selepas tamat kontrak syarikat akan beli balik?

Jawapan: Selepas tamat kontrak, selalunya consultant akan beritahu pada purchaser yang due untuk dijual balik dan beli balik gold atau jual balik dan ambil cash. There's an option.

(iii) Evidence of Suzy binti Mohamad Amin (PW10)

(vol. 2[d], p. 712 of the appeal record)

Soalan: Dan boleh beritahu Mahkamah apakah yang diterangkan kepada puan berkaitan dengan syarikat Genneva Malaysia Sdn Bhd ini oleh Puan Noorashikin pada masa itu?

Jawapan: Semasa itu dia beritahu syarikat Genneva Malaysia Sdn Bhd ini ada menawarkan pembelian dan jualan emas di mana pembelian itu bila kita beli syarikat Genneva akan beri *hibah* dan *hibah* bergantung kepada masa jualan tersebut is tidak tetap. Dan harga jualan kemungkinan

lebih mahal 20% atau 25% daripada harga market. Selepas tamat tempoh jualan kita ada tiga cara untuk sama ada kita nak jual semula kepada Genneva pada harga beli atau pun kita boleh simpan emas itu dan yang kedua kita boleh simpan emas itu dan ketiga kita boleh continue tempoh belian untuk dapatkan *hibah* baru semula.

Soalan: Selain daripada itu ada tak hal lain lagi?

Jawapan: Yang saya faham risiko dia kita beli harga itu lebih mahal daripada market. Tetapi pada masa yang sama Genneva sanggup beli balik pada harga yang kita beli.

(iv) Evidence of Ismail bin Hussin (PW12)

(vol. 2[e], pp. 975 - 978 of the appeal record)

Soalan: Dan boleh beritahu Mahkamah siapa yang memperkenalkan Haji kepada syarikat Genneva Malaysia Sdn Bhd?

Jawapan: Saya ada kawan lama di syarikat Avon. Kami dalam satu jabatan yang memperkenalkan saya mengenai Genneva gold ini. Dia tanya saya kamu dah bersara buat apa, jadi saya kata saya buat kerja-kerja kebajikan.

Soalan: Boleh beritahu siapa nama sahabat Tuan Haji yang memperkenalkan ini?

Jawapan: Rahim bin Shamsuddin.

Soalan: Apa yang diberitahu tentang Genneva Malaysia Sdn Bhd ini?

Jawapan: Dia cerita dekat saya, ini satu pelaburan yang menguntungkan. Jadi saya selaku pengerusi dan juga jawatankuasa memang kami mencari dana bagaimana nak membantu ahli-ahli yang memerlukan. Jadi apabila Encik Rahim jumpa saya, dia cerita dekat saya pelaburan ini, saya tertarik hati, berminat untuk melabur.

Soalan: Semasa Encik Rahim menerangkan kepada Haji dan Haji kata pelaburan menguntungkan ini. Apa yang dimaksudkan pelaburan yang menguntungkan?

Jawapan: Ia menguntungkan maknanya apabila kita melabur contohnya kita melabur RM1,000 kita beli emas RM1,000, apabila kita jual balik, kita dapat duit itu RM1,000, jadi kita tak ada kerugian dalam itu.

Soalan: Haji kata ada beli emas, apa yang dimaksudkan dengan beli emas ini dalam pelaburan yang Haji beritahu ini?

Jawapan: Masa itu ada offer, tawaran kalau tak silap saya keuntungan 3%. Jadi apabila 3% ini kita berminat.

Soalan: Apa maksud 3% ini?

Jawapan: 3% keuntungan daripada melabur.

A

Soalan: Setiap bulan atau pun setiap tahun?

Jawapan: Dia ada had sampai 3 bulan sahaja.

Soalan: Ada tak diterangkan lagi selain daripada pelaburan, beli emas, keuntungan, ada tak diterangkan lagi apa proses yang perlu dibuat?

B

Jawapan: Dia cerita dekat saya dalam segi *syari'ah* Islam memang tak ada masalah.

Soalan: Dan Haji tanya kenapa tak ada masalah?

Jawapan: Pasal apa dia dah dapat kelulusan Bank Negara, saya dengar kalau tak silap saya.

C

Soalan: Itu antara maklumat awal yang diberitahu kepada Tuan Haji?

Jawapan: Ya.

D

Soalan: Ada Encik Rahim juga beritahu selepas tamat kontrak 3 bulan yang Tuan Haji kata itu, apa perlu dibuat?

Jawapan: Dia cerita dekat saya, is tengok pasar emas itu. Mungkin pasar emas itu akan naik atau pun turun. Kalau katakan pasar emas itu naik, kita kena tambah lagi atau pun ikut nilai emas ikut kepada wang yang kita labur itu. Contoh, kita beri 1 ribu, kata nilai emas naik, kita tak ada duit nak tambah, kita guna 1 ribu itu untuk beli. Itu maksud saya.

E

Soalan: Untuk beli baru?

Jawapan: Ya, sebab prosesnya 3 bulan sekali.

F

Soalan: Kalau Haji tak berminat nak beli baru, apa akan terjadi?

Jawapan: Dia akan beri balik wang yang saya labur itu. Contohnya kalau saya labur 1 ribu, dia akan beri balik 1 ribu itu.

Soalan: Dan ada tak Encik Rahim beritahu Tuan Haji bahawa kalau kita beli emas, emas ini dapat pada kita atau tidak?

G

Jawapan: Encik Rahim kata kita beli emas, dia akan serahkan emas kepada saya untuk disimpan.

Soalan: Dan apa jadi pada emas itu habis tempoh 3 bulan kontrak yang Haji beritahu tadi?

H

Jawapan: Bila dah 3 bulan, kalau kita tak nak melabur lagi, kita serahkan balik emas itu kepada Encik Rahim dan Encik Rahim akan kembalikan wang yang kita laburkan.

(v) Evidence of Azizul Adzani bin Abdul Ghafar (PW34)

I

(vol. 2[h], pp. 1568 - 1572 of the appeal record)

Soalan: Ada tak Encik Azizul jelaskan berdasarkan kepada keratan akhbar atau notis yang dikeluarkan oleh pihak Genneva itu, kenapa nak buat risikan ini?

Jawapan: Antaranya adalah untuk memastikan sama ada pihak Genneva ada memberikan pulangan, *hibah*, dan juga membuat jaminan pembelian semula atau pun buy-back guarantee terhadap emas yang telah dibeli.

Soalan: Itu antara tindakan yang dibuat bagi tujuan pembelian emas ini. Kemudian, ada tidak perancangan dibuat bagi tujuan untuk membeli emas dan juga masuk ke dalam skim yang ditawarkan Genneva ini?

Jawapan: Rakan setugas saya, iaitu Cik Nor Shareena Rosli, telah membuat perhubungan awal dengan salah seorang pegawai pemasaran Genneva Malaysia Sdn Bhd, yang kemudiannya telah berjaya mengatur satu temu janji di antara pihak saya, Cik Nor Shareena dan pegawai tersebut di pejabat Genneva Malaysia Sdn Bhd di Jalan Kuchai Lama.

Soalan: Boleh Encik Azizul jelaskan nama pegawai pemasaran tersebut?

Jawapan: Nama pegawai tersebut ialah Ummi Salamah atau dikenali sebagai Ummi.

Soalan: Cuba ceritakan serba sedikit bagaimana kali pertama Encik Azizul dan Cik Nor Shareena berjumpa dengan Cik Ummi? Bila kali pertama?

Jawapan: Pertemuan kali pertama adalah pada 20 April 2012. Sewaktu pertemuan tersebut saya dan Cik Nor Shareena telah diterangkan oleh Ummi mengenai syarikat Genneva dan juga skim atau pun pelaburan emas yang dijalankan. Antara yang diterangkan adalah, bagi pembeli baru, perlu mengisi buyer profile form dan juga customer purchase order. Bayaran untuk emas yang akan dibeli perlulah didepositkan ke dalam akaun CIMB atas nama Genneva Malaysia Sdn Bhd. Pada waktu itu beliau tidak memberikan detail lanjut mengenai nombor akaun atau nama akaun secara penuh. Kemudian bukti bagi pembayaran tersebut hendaklah dikepilkan bersama dengan customer purchase order yang telah lengkap diisi. Seterusnya, pembeli juga perlu menandatangani sales and purchase agreement di antara pembeli dan juga pihak Genneva. Yang ketiga, pada awal tahun 2012, pihak Genneva menawarkan kontrak selama 2 bulan dengan kadar *hibah* sebanyak 6 peratus. Walau bagaimana pun, kuatkuasa April 2012, jumlah kontrak telah dipanjangkan menjadi 3 bulan dan kadar *hibah* dikurangkan menjadi 1.8 peratus menjadikan keseluruhan *hibah* yang diterima adalah sebanyak 5.4 peratus. Selain daripada dokumen yang dinyatakan tadi, saya juga akan diberikan letter of *hibah* yang ada menyatakan secara jelas kadar *hibah* yang

akan diterima dan tempoh pemberian *hibah* tersebut. Tempoh pemberian *hibah* adalah mengikut kontrak yang dinyatakan tadi.

Soalan: Ada tak diterangkan tentang emas itu sendiri?

Jawapan: Disebabkan permintaan yang terlampau tinggi, emas hanya akan diserahkan dalam tempoh 7 hingga 14 hari, pada ketika itu.

Soalan: Ada tidak diterangkan, sekiranya tamat 3 bulan tempoh kontrak, apa jadi dengan emas ini?

Jawapan: Seterusnya apabila kontrak telah tamat, pihak pembeli mempunyai 3 pilihan. Yang pertama, menyimpan terus emas yang dibeli. Yang kedua, boleh memperbaharui kontrak dengan Genneva Malaysia Sdn Bhd atau pun yang ketiga, boleh menjual semula kepada pihak Genneva Malaysia Sdn Bhd pada harga belian. Dan yang terakhir diterangkan oleh Cik Ummi, walau pun pihak Genneva Malaysia Sdn Bhd telah mengeluarkan satu notis atau announcement ... .

[52] Emily Choo Soke Yee (PW64) is a partner in Corporate Finance Department of KPMG Malaysia. She prepared a report on her analysis of the business model of Genneva Malaysia and after having interviewed the accused. According to PW64, she was of the view that Genneva Malaysia was offering an investment product and not carrying on the ordinary sale and purchase of gold. The following parts of her evidence are pertinent:

(i) (vol. 2[q], p. 3353 of the appeal record)

The product of the company, is not only gold, but gold comes with *hibah* and a potential buy-back of the gold.

From the interview sessions, we understand the company will buy-back the gold from the customer at the same price they sold the gold to the customer. From this piece of information during the interview, I will then look into the CIS system to confirm whether the gold has been purchased back at the same price when it was sold. And, as well as, the occurrence of the buyback. Based on the information obtained from the CIS, my analysis of the data, which in the period of April 2011 to 31st October 2012, the company bought back 98 percent of gold from the customer. When I mean 98 percent, means transactions, say when they are transaction or sell, and there are transaction of buyback. So, 98 percent of customer transactions were bought back in terms of the gold. In terms of grammage, the percentage of buyback is 94 percent.

(ii) (vol. 2[q], p. 3374 of the appeal record)

> … A 2% *hibah* per months, a 6 months means 12% cost. So, in that scenario where the company runs a 6 months *hibah* period, it is a totally a loss business model. So, it then go to the analysis of why the business exits. When there is actually no profit model in this business in longer term, it may be a profit model in a month or two, but the customer base will grow, and you will be deepened into loss position.

(iii) (vol. 2[q], p. 3375 of the appeal record)

> Yes, when we first started do the interview sessions with the directors and the key officers, we were given understanding that the company is simply a gold dealer, no difference from, like any of the jewelry shop such as Poh Kong or Tomei to that extend. That was what said to us during interview sessions. As we went into the documents and understand how the business run, also from the directors, so I have earlier state that, we are of opinion that the company is offering investment product. And the underline asset is gold. So we, based on our understanding and findings, the business model from the interview session stated that, the company product is an investment product, an underline asset of this investment is in gold.

Defence Of The Sixth Accused

[53] The crux of the defence for the sixth accused is that he was not involved in the illicit scheme. He was merely fulfilling a role to be the Malay Muslim director for Genneva Malaysia because the company was running a business purportedly based on the *Syari'ah* principles.

Analysis Of The Defence For The Charges Under BAFIA

[54] In reviewing the evidence, I am of the considered view that this is clearly not an ordinary sale transaction. Gold is sold and re-purchased at the same price. There was no element of profit in that scenario. In the absence of the profit element, one can only think of a charitable scenario but Genneva Malaysia is not a charitable organization and far from being a welfare body. The absence of the profit element in the transaction and the presence of "*hibah*" had in fact revealed something more sinister.

[55] The fact that the "buy-back" was explained by the consultants of Genneva Malaysia to the customers was not disputed. If a "buy-back" was not part of the terms, there is no necessity for the consultants to explain it to the customers. The "buy-back" practice coupled with the express term of "no buy-back guarantee" terms are essentially the underlying terms of the scheme perpetuated in disguise by Genneva Malaysia.

[56] If it is not part of a term in the transaction and if as a matter of fact, a discretion is actually ordinarily vested in Genneva Malaysia whether or not to buy the gold back, why should the consultants of Genneva Malaysia take the trouble to explain it to the customers? After all, if it was indeed an ordinary sale and purchase transaction of gold, such a course of conduct should be the norm.

[57] Even the defence took the position that the transaction was completed the moment the customer paid the price and took possession of the gold. There should not be any re-purchase obligation on Genneva Malaysia in the event the customers wished to re-sell the gold back to it but if they do, there was also no impediment for Genneva Malaysia to buy it back from the participants. Why should there be a term for something that obvious?

[58] If in fact there was no buy-back term and the fact that the documents expressly stipulates such term are the evidence to show that there was no buy-back term and Genneva Malaysia was not obliged to re-purchase the gold, why should such a term stipulating no buy-back be incorporated in any of the documents in the first instance?

[59] If it was an ordinary sale and purchase of gold as contended by learned counsel, the term stipulating no buy-back is not even necessary. It will always be the norm that there shall be no obligation to purchase. What can be reasonably deciphered and inferred from the circumstances of the present appeal is that the documents were designed as an elaborate scheme of deposit taking and gold was used as an instrument to perpetuate that scheme.

[60] No matter how the documents were worded, they could not absolve Genneva Malaysia and all the accused from the fact that the true nature of the gold transaction was indeed an illegal deposit-taking scheme. Genneva Malaysia could very well devise various documents to show, *inter alia*, that the transactions were done on a willing seller-willing buyer basis, that the price of gold is based on the price quoted by GBEAM, that the grant of "*hibah*" was the absolute discretion of Genneva Malaysia or that Genneva Malaysia retained the absolute discretion whether to accept the purchaser's offer to re-sell the gold back. However, the culpability of Genneva Malaysia and the accused in the present case is not determined by how the documents were crafted or worded. It is for the court to consider the fact and circumstances surrounding the transaction in order to determine the true nature of the transaction in spite of the documents which may be used as mere fronts.

[61] After having bought gold from Genneva Malaysia at a premium of between 20% to 25% of the normal retail price for gold, can the purchaser re-sell it to any other person for the same price or would there be any other buyer who would be willing to splurge more than the normal retail price for the very same amount of gold? Highly unlikely. Even the average price increase in a year did not exceed 18%. Would any person buy gold from Genneva Malaysia despite it is priced at a premium? Not just from any jeweller but from Genneva Malaysia? Definitely yes. With the option of re-selling it back to Genneva Malaysia at its original price and the opportunity to earn a "profit" of between 1% to 8% in terms of "*hibah*", it would be too lucrative to refuse and theoretically there was practically nothing to lose.

[62] If in fact there was no oral representation made to the purchasers that Genneva Malaysia will buy-back the gold or that Genneva Malaysia had in fact not been practising the buy-back option, would anyone in his right frame of mind buy gold from Genneva Malaysia at a premium? I do not think so. Was Genneva Malaysia capable of honouring the unfulfilled purchases of gold amounting to a whopping RM859,865,679.14? With the total value of gold and cash amounting to a mere RM97,582,359.26 at the disposal of Genneva Malaysia at the time of the raid, there is not the slightest chance that that will happen.

[63] The defence argued that the business model adopted by Genneva Malaysia complies with the *Syari'ah* principles as their internal "*Syari'ah*" committee, dubbed the SACB, had ensured that the gold transactions were *Syari'ah*-compliant. First of all, it must be made clear that the members of the SACB are not persons who are legally authorised to make any decisions much less to issue any edict or *fatwa* on the gold transactions as carried out by Genneva Malaysia. Their input or advise cannot and should not be liken to that which is issued by the State of National Fatwa Council as far as matters relating to the religion of Islam and the Islamic principles are concerned.

[64] At the very best, they may be regarded as mere advisory and not binding at all. Even in that sense, the advisory nature of the views and recommendations of SACB cannot outweigh the effect and meaning of applicable laws. As such, whether or not in fact the gold transactions carried out by Genneva Malaysia were *Syari'ah*-compliant is not for SACB to determine. Genneva Malaysia could not shield itself and hide behind SACB to portray the notion that the gold transaction it carried out was one which was legitimate without proper verification being made by the appropriate authorities. SACB was not the authoritative or recognised body insofar as the *Syari'ah* principles are concerned.

[65] I am of the considered view that the *modus operandi* and business model adopted by Genneva Malaysia is inconsistent with its stand that it was only carrying out an ordinary trade in gold. Furthermore, if it was an ordinary trade in gold, there was no necessity for the terms on *hibah*.

[66] The fact that the business model adopted by Genneva Malaysia being one which was not commercially sustainable, as testified by the experts in the industry as well as one of the major industry players in the country, further fortified the fact that practices adopted by Genneva Malaysia in the impugned gold transactions were not the ordinary business transactions with a view to profit. It was not profit-oriented and far from one which is charitable. Taking these circumstances as a whole, there is no doubt in my mind that the terms on *hibah* and the express terms of no buy-back guarantee are mere guises and camouflage in an attempt to conceal the real deal, namely, that Genneva Malaysia was involved in deposit taking without a valid licence.

[67] This is fortified by the fact that the practice is in direct opposite of the no buy-back terms. It was the continued practice by Genneva Malaysia of buying back the gold which have been sold to the customers that form the basis for the term which is essential to the foundation of the scheme. There was no evidence to show a single instance where the buy-back practice not followed. This was also a finding of fact made by the learned Sessions Court Judge.

[68] In effect, the whole background for the sale of gold to the customers and the buy-back practice by Genneva Malaysia is actually the term of the transaction which have been carefully crafted to elude detection by the authorities. I am of the considered view that the business model adopted by Genneva Malaysia amounted to nothing more than a scheming gimmick to perpetuate its activities and that has attracted an offence under s. 25(1) of the BAFIA.

[69] The accused in their respective defence did not challenge the fact that Genneva Malaysia was not licensed under the BAFIA to accept deposit. The accused could not pass the buck to the Central Bank of Malaysia. In any event, the Central Bank of Malaysia merely said that Genneva Malaysia may trade in gold as it does not require any licence. There was no evidence to show that the whole scheme was explained in detail to the Central Bank of Malaysia including the fact that Genneva Malaysia has been buying back gold from its purchasers. Further, whether or not the product and business model of Genneva Malaysia is *Syari'ah*-compliant is immaterial to the charge of accepting deposit without a valid licence.

[70] Likewise, the sixth accused too was equally culpable. Section 106(1) of the BAFIA is a deeming provision of the commission of the offence by a director where the offence is committed by the company. The effect of this deeming provision is equivalent to any other statutory presumptions in other laws. (See: *PP v. Gan Boon Aun* [2015] 9 CLJ 328 CA; [2015] 6 MLJ 32; [2015] MLRAU 330; [2015] AMEJ 1442). It may only be rebutted in accordance with the statutory defence provided, namely if he proves:

(i) that the offence was committed without his consent or connivance, and

(ii) that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised,

having regard to the nature of his functions in that capacity and to all the circumstances.

Section 106(1) of the BAFIA reads as follows:

> Offences by institution and by servants and agents
>
> 106. (1) Where any offence against any provision of this Act has been committed by any institution, any person who at the time of the commission of the offence was a director, officer, or controller, of the institution or was purporting to act in any such capacity, or was in any

manner or to any extent responsible for the management of any of the affairs of such institution, or was assisting in such management, shall be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

[71] Merely asserting that he had no role to play in the illicit scheme is not enough. The position as a director carries certain duties and responsibilities under the law. In *Beucar Accessories (M) Sdn Bhd v. Gordon Toh Chun Toh & Ors* [2012] 1 LNS 164; [2012] MLRHU 1882; [2012] 4 AMR 201, Her Ladyship Hadhariah Syed Ismail JC (now JCA) made the following observations:

Question arose whether D3 also had breached his fiduciary duties owed to the plaintiff in respect of RM500,000.00 losses? D3 claims he was merely a non-executive director and an independent director. I reject his contention. Under the law there is no distinction of directorship in a private limited company. I refer to *Ravichantiran Ganesan v. Percetakan Wawasan Maju Sdn Bhd & Ors* [2008] 9 CLJ 546; [2008] 8 MLJ 450. In that case, the High Court held:

> Even if the plaintiff was a non executive director, his roles and duties were still governed by the Companies Act 1965, in particular s. 132. As a non executive director he was entrusted to look after the affairs of the company and to keep a close watch on the company's managers and other directors in order to safeguard the investment of shareholders.

In *Lembaga Kumpulan Wang Simpanan Pekerja v. Adorna RMIT Sdn Bhd & 9 Ors* [2003] 1 LNS 482; [2003] 4 MLJ 729, Kamalanathan Ratnam J had this to say:

> Directors are *alter ego* of a company. It is therefore not appropriate for a director to attempt to escape culpability by pleading that he is a sleeping partner or director or a silent director or a non executive director.

I shared the same view as expressed in both the two cases cited above. The court is not concerned with the label attached to a director. The court merely look into the fact that once a person has accepted his appointment as a director of a company, under the law he is deemed to have understand his duties and agreed to discharge those duties carefully, skilfully, diligently and honestly. If he chose to adopt an attitude of not to know the affairs of the company, in the eyes of the law, he could not be relieved from his responsibility because he should not have accepted the directorship if he had no intention to carry out the duties imposed on him.

[72] Section 106(1) of the BAFIA requires the accused as a director to do something more, befitting his position, duties and responsibilities. There was nothing to show that the sixth accused as a director had done anything to ensure that Genneva Malaysia did not embark on a venture that is against the law. Under the law, as a director he cannot shun away from his duties or liabilities by claiming that the matter was not within his purview. On the facts, I find that the sixth accused had not successfully brought himself within the statutory defence provided for under s. 106(1) of the BAFIA.

[73] When all the facts and circumstances are taken together, it became clear that Genneva Malaysia was merely using gold as a medium to camouflage the deposit-taking scheme it perpetuated. Since gold is a very attractive and valuable commodity, it lends a bit more credit to the unsuspecting public compared with any other scam of deposit-taking. But when the scheme is closely examined in detail, it clearly defied common sense and on the same breath did not constitute a defence that is probable in the circumstances of the case.

Money Laundering

[74] The money laundering charges proffered against the accused persons relate to the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ("AMLATFA"). The definition of "money laundering" under s. 3 of the AMLATFA reads as follows:

> Interpretation
>
> 3. (1) In this Act, unless the context otherwise requires:
>
> "money laundering" means the act of a person who:
>
> (a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
>
> (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or
>
> (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity,
>
> where:
>
> (aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
>
> (bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

[75] A person who engages in money laundering commits an offence under s. 4 of the AMLATFA. Section 4 of the AMLATFA provides as follows:

> Offence of money laundering
>
> 4. (1) Any person who:
>
> (a) engages in, or attempts to engage in; or
>
> (b) abets the commission of,
>
> money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.
>
> (2) A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

[76] Briefly, the term "proceeds of an unlawful activity" simply means any property which is obtained as a result of any unlawful activity. "Unlawful activity" in turn is defined as any activity which is related to any serious offence. The "serious offence" in the present appeal is the offence under s. 25(1) of the BAFIA, namely of accepting deposit without a valid licence.

The definition of the term "proceeds of unlawful activity" under s. 3 of the AMLATFA is as follows:

> Interpretation
>
> 3. (1) In this Act, unless the context otherwise requires:
>
> "proceeds of an unlawful activity" means any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity;

The definition of the term "unlawful activity" under s. 3 of the AMLATFA is as follows:

> Interpretation
>
> 3. (1) In this Act, unless the context otherwise requires:
>
> "unlawful activity" means any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence;

The definition of the term "serious offence" under s. 3 of the AMLATFA is as follows:

> Interpretation
>
> 3. (1) In this Act, unless the context otherwise requires:
>
> "serious offence" means:
>
> (a) any of the offences specified in the Second Schedule;
>
> (b) an attempt to commit any of those offences; or
>
> (c) the abetment of any of those offences;

[77] The money laundering charges against all the accused persons were proffered under para. (a) of s. 4(1) of the AMLATFA. As a matter of the ingredients of the offence and in the context of the present appeal, it is for the prosecution to prove the following:

(i) that the accused was engaged, either directly or indirectly, in a transaction that involves the impugned monies,

(ii) that the impugned monies are the proceeds of an unlawful activity,

(iii) that the unlawful activity is the offence of accepting deposit without a valid licence, and

(iv) that it may be inferred from the objective circumstances that the accused knew or had reason to believe that the monies are the proceeds of an unlawful activity.

[78] In respect of the charges under s. 4(1)(a) of the AMLATFA for the offence of money laundering, I am of the considered view that the prosecution has adduced sufficient evidence to prove the receipt of monies by each accused through multiple cash cheques which originated and traceable from the two impugned CIMB Islamic Bank Berhad accounts belonging to Genneva Malaysia, namely Account No. 14560000510100 and Account No. 14560000662104.

[79] The prosecution has also adduced sufficient evidence by means of a forensic accounting analysis by PW89 and the money trail, as illustrated in appendix 1 to appendix 11, to show that the monies in these accounts are proceeds of an unlawful activity, namely of the offence under s. 25(1) of the BAFIA of accepting deposit without a valid licence which is categorised as a serious offence under the AMLATFA.

Analysis Of The Defence For The Charges Under AMLATFA

[80] The fact that the all accused were engaged in transactions involving monies obtained from the illicit scheme of accepting deposit without a valid licence is not in dispute. All of the accused did receive the monies in their respective accounts as evidenced by the money trail and the forensic account reports. In their defence, the accused claimed that the monies they receive were salaries and bonuses, claims for expenses incurred, commissions on sales, management consultant fees, payment for consultation services and payments for *hibah* received on behalf of the customers.

[81] The evidence shows that all the accused persons had knowledge of the business model of Genneva Malaysia. That means, they knew:

(i) that Genneva Malaysia is not legally licensed to accept deposits,

(ii) that Genneva Malaysia sold gold at a premium of between 20% to 25% compared with the normal retail price for gold,

(iii) that Genneva Malaysia practised buy-back of gold from its purchasers at the original price,

(iv) that Genneva Malaysia makes "*hibah*" payments to its purchasers,

(v) that despite the price of gold sold by Genneva Malaysia is higher than the normal retail price for gold, a sizeable number of customers still opted to purchase gold from Genneva Malaysia whereas:

(a) the purchasers could simply purchase the same gold from any normal jewellers at a cheaper price if indeed they intend to keep the gold as an investment,

(b) the purchasers need not wait for the price of gold to exceed more than the premium they paid in order to get profit for their investment,

(c) the purchasers could easily lose a lot more if the price of gold drops as they had purchased at a premium from Genneva Malaysia.

[82] The Court of Appeal in *Azmi Osman v. PP & Another Appeal* [2015] 9 CLJ 845 CA; [2016] 3 MLJ 98; [2015] MLRAU 459; [2016] 2 AMR 597, dealt with issues touching on the required *mens rea* element in a charge under s. 4(1)(a) of the AMLATFA and the duty of persons who are concerned in transactions involving the proceeds of an unlawful activity. In delivering the judgment of the court, His Lordship Abang Iskandar JCA (now CJ of Sabah and Sarawak) observed as follows:

> [36] Those paras. (aa) and (bb) define the *mens rea* necessary to turn the preceding *actus reus* (conduct) into a money laundering offence. It does not excuse wilful blindness on the part of the accused person. There is no room for safe harbours, where proceeds of an unlawful activity may find itself quietly nestling in so-called bank accounts of "innocent" account holders. A bank account holder must be vigilant and must take steps to ensure that monies that are received in his account are not proceeds of any unlawful activity and that he knows that the source of those monies is lawful, lest he runs afoul of AMLATFA and runs the risk of being charged for an offence of money laundering. The doctrine of wilful blindness imputes knowledge to an accused person who has his suspicion aroused to the point where he sees the need to inquire further, but he deliberately chooses not to make those inquiries. Professor Glanville Williams has succinctly described such a situation as follows: "He suspected the fact; he realised its probability but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone is wilful blindness." (Glanville Williams, *Criminal Law* 157, 2nd edn, 1961). Indeed, in the context of anti-money laundering regime, feigning blindness, deliberate ignorance or wilful ignorance is no longer bliss. It is no longer a viable option. It manifests criminal intent.

[83] I am of the considered view that the aforementioned factors must be taken to represent the relevant objective factual circumstances in respect of the receipt of the impugned monies in the various accounts of the respective accused persons. In view of the facts in the present appeal, all the accused persons must be taken to at least harbour some reasonable suspicion as to the business model practised by Genneva Malaysia and must undertake steps to make further inquiries rather than just rely on what was advised to them by persons appointed by Genneva Malaysia itself. Even a casual visit to the nearest jeweller could immediately put them on alert as to the normalcy of the transaction. In this regard, I find that the defence has failed to raise a reasonable doubt in the prosecution's case in the money laundering charges.

Conclusion

[84] In *Gunalan Ramachandran & Ors v. PP* [2006] 1 CLJ 857 FC; [2006] 2 MLJ 197; [2006] 1 MLRA 97; [2006] 2 AMR 465, the apex court reiterated the principles to be observed by trial courts at the end of the defence case in the following words:

> To earn an acquittal, the court may not be convinced of the truth of the defence story or version. Raising a reasonable doubt in the guilt of the accused will suffice. It is not, however, wrong for the court to be convinced that the defence version is true, in which case the court must order an acquittal. In appropriate cases it is also not wrong for the court to conclude that the defence story is false or not convincing, but in that instance, the court must not convict until it asks a further question, that even if the court does not accept or believe the defence explanation, does it nevertheless raise a reasonable doubt as to his guilt? It is for this reason that in dealing with the defence story or explanation, the majority of judges rightly prefer to adopt straightaway the legally established 'reasonable doubt' test, rather than to delve in the 'believable and convincing' test before applying the reasonable doubt test.

[85] In re-evaluating the defence against the totality of the evidence adduced by the prosecution and on the premise of the aforesaid reasons, I find that:

(i) in respect of the charge for the offence of accepting deposit under s. 25(1) of BAFIA;

(ii) in respect of the charge for the offence of accepting deposit without a valid licence under s. 25(1) read together with s. 106(1) of the BAFIA;

(iii) in respect of the offence of abetting the commission of the offence of accepting deposit without a valid licence under s. 25(1) read together with s. 112(1)(c) of the BAFIA; and

(iv) in respect of the offence of money laundering under s. 4(1)(a) of the AMLATFA,

the defence, respectively, has failed to raise a reasonable doubt in the prosecution's case and that the prosecution has succeeded in establishing its case against the respective accused persons beyond a reasonable doubt.

[86] In the circumstances, I hereby reverse the decision of the learned Sessions Court Judge and convict the following accused persons as follows:

(i) Genneva Malaysia for the offence of accepting deposit under s. 25(1) of BAFIA;

(ii) (i) Tan Liang Keat, (ii) Lim Kah Heng, (iii) Phillip Lim Jit Meng and (iv) Ahmad Khairuddin bin Ilias, respectively, as the officers of Genneva Malaysia for the offence of accepting deposit without a valid licence under s. 25(1) read together with s. 106(1) of the BAFIA;

(iii) Ng Poh Weng for abetting the commission of the offence of accepting deposit without a valid licence under s. 25(1) read together with s. 112(1)(c) of the BAFIA; and

(iv) (i) Genneva Malaysia, (ii) Tan Liang Keat, (iii) Lim Kah Heng, (iv) Ng Poh Weng, (v) Phillip Lim Jit Meng, (vi) Marcus Yee Yuen Seng, (vii) Chiew Soo Ling, (viii) Success Attitude Sdn Bhd, (ix) Ng Advantage Sdn Bhd and (x) Yao Kee Boon, respectively, for the offence of money laundering under s. 4(1)(a) of the AMLATFA.

Sentence

[87] The factors which are taken into consideration by the courts in passing the appropriate sentence depend on many factors. In *Amir Hassan Ali Usin v. PP* [2019] 3 CLJ 325 CA; [2018] 6 MLJ 421; [2019] 2 SSLR 327; [2018] 6 AMR 213, His Lordship Kamardin Hashim JCA observed as follows:

> [16] There are many factors that need to be taken into account in assessing the appropriate sentence based on the facts and circumstances of each case such as the nature of the offence, the circumstances in which it was committed, the mitigating factors, the aggravating factors and the trend of sentencing. Another important factor to be considered is whether the offender is a habitual offender or a first offender. The list will never be exhaustive.

[88] In considering the appropriate sentence, this court is mindful that public interest should be foremost. (see: *PP v. Loo Choon Fatt* [1976] 1 LNS 102; [1976] 2 MLJ 256; [1976] 1 MLRH 23). In *Tan Sri Abdul Rahim Mohd Noor v. PP* [2001] 4 CLJ 9 CA; [2001] 3 MLJ 1; [2001] 1 MLRA 646; [2001] 3 AMR 3253, the Court of Appeal made a prompt as to the need to strike a balance between the interest of the offender and the interest of the community at large in sentencing. In delivering the judgment of the Court of Appeal, His Lordship Shaik Daud Ismail JCA observed as follows:

> It cannot be gainsaid that the most onerous function of any court is to decide the appropriate sentence in any criminal case. In deciding the appropriate sentence a court should always be guided by certain

considerations. The first and foremost is the public interest. In that context the interest of justice should no doubt take into account the interest of the offender. But it is often forgotten that the interest of justice must also include the interest of the community. In assessing sentence the court should balance the interest of the offender with the interest of the victim and strike a balance, not, of course forgetting that the interest of the public should be of the uppermost consideration.

[89] The offence of deposit-taking causes monetary loss to the general public who were duped into believing in the illicit scheme and in many cases even institutional and corporate personalities were not spared. It is an economically destructive offence and in the present appeal, the sheer size of the amount involved is testament of the serious repercussions it has brought about. The swift and timely action by the Central Bank of Malaysia together with the Royal Malaysian Police has prevented further loss and damage from being suffered by others who may otherwise be attracted to the illicit scheme. Much has been said about lack of enforcement by the authorities but this case proves that such views are misplaced. The authorities had in fact upped the *ante* by coming down hard on the perpetrators while they were at it and before they could cause further and greater loss to the public.

[90] The offence under s. 25(1) is punishable under s. 103(1)(a) of the BAFIA. Upon conviction for a first offence, it is punishable with imprisonment for a period not exceeding ten years or with a fine not exceeding RM10 million or both.

Section 103(1)(a) of the BAFIA reads as follows:

> Scheduled offences and penalties for them
>
> 103. (1) Any person who contravenes:
>
> (a) any provision of this Act set out in the second column of the Fourth Schedule; or
>
> (b) any specification or requirement made, or any order in writing, direction, instruction, or notice, given, or any limit, term, condition or restriction imposed, or any other thing howsoever done, in the exercise of any power conferred under, pursuant to, or by virtue of, any provision of this Act set out in the third column of the Fourth Schedule,
>
> shall be guilty of an offence under such provision and shall on conviction be liable to be punished with imprisonment not exceeding the term set out in the fourth column of the Fourth Schedule or with a fine not exceeding the amount set out in the fifth column of the Fourth Schedule, or with both such imprisonment and fine, and in the case of a continuing offence, shall, in addition, be liable to be punished with a daily fine not exceeding the amount set out in the sixth column of the Fourth Schedule for every day during which the offence continues:
>
> Provided that where the person found guilty of such offence is a body corporate, the punishment of imprisonment set out in the fourth column of the Fourth Schedule shall not apply to it.

The relevant parts of the Fourth Schedule are as follows:

FOURTH SCHEDULE

(Section 103)

Offences and Penalties

First Column	Second Column	Third Column	Fourth Column	Fifth Column	Sixth Column
Serial No.	Provision of this Act under section 103(a)	Provision of this Act under section 103(b)	Imprisonment	Fine RM	Daily Fine RM
20	Section 25(1)	—	10 years	10 million	100 thousand

[91] The offence of money laundering under s. 4(1)(a) of the AMLATFA is punishable with a fine not exceeding RM5 million or to imprisonment for a term not exceeding five years or to both.

Section 4(1)(a) of the AMLATFA reads as follows:

> Offence of money laundering
>
> 4. (1) Any person who:
>
> (a) engages in, or attempts to engage in; or
>
> (b) abets the commission of,
>
> money laundering, commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.
>
> (2) A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

[92] After considering the submissions of learned counsel to mitigate the sentence and the submissions of the learned DPP to aggravate the sentence, I hereby sentence the accused as follows:

(i) for the offence of accepting deposit under s. 25(1) of the BAFIA, for each charge, Genneva Malaysia Sdn Bhd is sentenced to a fine of RM3 million,

(ii) for the offence of accepting deposit without a valid licence under s. 25(1) read together with s. 106(1) of the BAFIA:

(a) for each charge, Tan Liang Keat is sentenced to imprisonment for the period of six years from the date of sentence and a fine of RM2 million in default two years of imprisonment,

(b) for each charge, Lim Kah Heng is sentenced to imprisonment for the period of six years from the date of sentence and a fine of RM2 million in default two years of imprisonment,

(c) for each charge, Phillip Lim Jit Meng is sentenced to imprisonment for the period of six years from the date of sentence and a fine of RM2 million in default two years of imprisonment,

(d) for each charge, Ahmad Khairuddin bin Ilias is sentenced to imprisonment for the period of six years from the date of sentence and a fine of RM2 million in default two years of imprisonment,

(iii) for the offence of abetting the commission of the offence of accepting deposit without a valid licence under s. 25(1) read together with s. 112(1)(c) of the BAFIA, for each charge, Ng Poh Weng is sentenced to imprisonment for the period of three years from the date of sentence and a fine of RM2 million in default two years of imprisonment taking into consideration that he had conceded the appeal despite having earlier been acquitted by the trial court,

(iv) for the offence under s. 25(1) read together with s. 106(1) and the offence under s. 25(1) read together with s. 112(1)(c) of the BAFIA, the sentence of imprisonment shall run concurrently.

(v) for the offence of money laundering under s. 4(1)(a) of the AMLATFA:

(a) for each charge, Genneva Malaysia Sdn Bhd is sentenced to a fine of RM2 million,

(b) for each charge, Tan Liang Keat is sentenced to imprisonment for the period of three years from the date of sentence and a fine of RM1 million in default two years of imprisonment,

(c) for each charge, Lim Kah Heng is sentenced to imprisonment for the period of three years from the date of sentence and a fine of RM1 million in default two years of imprisonment,

(d) for each charge, Ng Poh Weng is sentenced to imprisonment for the period of one year from the date of sentence and a fine of RM1 million in default two years of imprisonment,

(e) for each charge, Phillip Lim Jit Meng is sentenced to imprisonment for the period of three years from the date of sentence and a fine of RM1 million in default two years of imprisonment,

(f) for each charge, Marcus Yee Yuen Seng is sentenced to imprisonment for the period of three years from the date of sentence and a fine of RM1 million in default two years of imprisonment,

(g) for each charge, Chiew Soo Ling is sentenced to imprisonment for the period of three years from the date of sentence and a fine of RM1 million in default two years of imprisonment,

(h) for each charge, Success Attitude Sdn Bhd is sentenced to a fine of RM1 million,

(i) for each charge, Ng Advantage Sdn Bhd is sentenced to a fine of RM1 million, and

(j) for each charge, Yao Kee Boon is sentenced to imprisonment for the period of three years from the date of sentence and a fine of RM1 million in default two years of imprisonment.

(vi) for the offence of money laundering under s. 4(1)(a) of the AMLATFA, the sentence of imprisonment shall run concurrently.

(vii) the sentence of imprisonment for the offences under BAFIA and the sentence of imprisonment for the offence under AMLATFA shall run consecutively.